Synergy Promenade Sdn Bhd v Felda Investment Corp Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCVC-477–07 OF 2019
AZIMAH OMAR J
23 JULY 2020

Civil Procedure — Summary judgment — Application for — Plaintiff brought action against defendant seeking for specific performance of development agreement — Plaintiff applied for summary judgment — Whether development agreement tainted with fraud, dishonesty and conspiracy — Whether there was contravention of s 3 of the Land Development Act 1956 — Whether claim time barred by virtue of s 2 of the Public Authorities Protection Act 1948 — Whether there were serious and triable issues — Rules of Court 2012 O 81

By a development agreement ('the DA') entered on 2 June 2014, the first defendant ie Felda Investment Corp Sdn Bhd ('D1') had appointed the plaintiff as the master developer to develop and to complete a mixed development on 24 parcels of land in an area owned by the second defendant ie Federal Land Development Authority commonly known as FELDA ('D2') ('the land'). D2 was the registered proprietor and beneficial owner of the land. Article 6.04(a) of the DA stipulated that to enable the plaintiff to carry out the development of the project, D1 shall cause D2 to deliver vacant possession of the land to the plaintiff within 30 days from the date of the DA was executed. The plaintiff pleaded that aside from delivering vacant possession of only one out of 24 parcels of the land on or about January 2016, the defendants had yet to deliver vacant possession of the remaining 23 parcels to the plaintiff. After a lapse of more than five years after the DA was executed, the plaintiff claimed that there was a breach on the part of the defendants for failing to deliver vacant possession of the remaining 23 parcels of land as stipulated under the DA. Pursuant to article 9.04 of the DA, the plaintiff filed this action against the defendants seeking for specific performance of the DA. Vide encl 7, the plaintiff sought for a summary judgment against the defendants pursuant to O 81 of the Rules of Court 2012 for, inter alia, a decree of specific performance against the defendants requiring them to comply with the DA and a consequential order directing the defendants to deliver vacant possession of the lands to the plaintiff. In their defence, the defendants primarily challenged the enforceability and validity of the DA on, inter alia, the following grounds: (a) the DA was null and void ab initio, unenforceable and/or liable to be set aside as it was tainted with fraud, dishonesty and conspiracy of D1's previous Board and previous management and the plaintiff; (b) the DA was executed in contravention of s 3 of the Land Development Act 1956 ('the LDA') as the

consent of the Minister was not sought or obtained before executing the DA; (c) the plaintiff's claim was time barred by virtue of s 2 of the Public Authorities Protection Act 1948 ('the PAPA'); and (d) the plaintiff did not come to court with clean hands and there had been undue delay on the part of the plaintiff in seeking for the remedy of specific performance.

Held, dismissing the plaintiff's application:

(1) The plaintiff was nevertheless appointed as the master developer of the project despite the fact that the plaintiff was grossly lacking in suitability and qualification. The circumstances of the plaintiff's appointment raised the court's apprehension to question the logic and reason behind the plaintiff's appointment (which definitely raised a triable issue). It did not make commercial or business sense for FELDA to undertake an investment for a return on investment much lower than the land value itself. Furthermore, FELDA had its own internal (in house) subsidiary company which was already in the industry of property development and construction business. There were indeed circumstances which seemed to lend some credence to the defendants' allegations of dishonesty, fraud and conspiracy. There were facts and circumstances that questioned the very integrity of the entire transaction leading to the DA. Clearly the court could not simply ignore this triable issue. The absence of important and critical provisions in the DA seemingly suggested that there were elements of fraudulent biasness, undue advantage and profits handed out to the plaintiff by the defendants' previous Board and management. It was infinitely perplexing that the DA's execution (and the plaintiff's appointment) pre-existed the Board's approval of the plaintiff's appointment. The execution of the DA was seemingly questionable and seems to be hastily prepared. Witnesses should be called to testify not only on the credibility of the parties signing the DA, but also the integrity of the said DA which lacked securing provisions. In addition, the DA's date of execution was clearly masked and backdated to be 2 June 2014. In light of these seriously disputed set of facts presented to the court together with documentary evidence supporting those facts by the defendants' that the DA and the power of attorney were tainted with fraud and conspiracy must not be ignored by the court and the truth of the transactions could only be unravelled via viva voce evidence at full trial (see paras 27, 30–32, 34–36, 40 & 47).

(2) The significance of the Minister's approval was very much glaring by reading s 3(3)(c) of the LDA. It was not just a statutory requirement but it formed the very foundation of a legal contract involving the defendants. The failure of obtaining the approval of the Minister was a serious and triable issue which directly affected the validity and integrity of the DA. The basis of the DA was the development of Federal land. *Res ipsa loquitor* that all parties ought to have known that they must comply

with and abide by the governing law of developing Federal lands with the FELDA. The plaintiff could not feign ignorance to the very statute governing the DA. The plaintiff out of its own volition elected to be embroiled in this predicament and could not simply deflect the want of statutory compliance (Minister's approval) against the defendants. Since the failure to obtain approval of the Minister before proceeding with the DA affected the inception of the DA, it would undoubtedly affect the legality of the said DA. Therefore, it was unfitting for the court to simply summarily order the specific performance when the very integrity and legality of the DA (and other supporting documents alike) became a triable issue before the court (see paras 52–53, 56 & 59).

(3) D2 as the party to the DA, was clearly included under the definition of 'public authority' due to its crucial public function which shoulders the great interest of the public in respect of land development (in efforts of eradicating poverty through the cultivation of oil palm and rubber). Therefore, the fundamental public element that existed within FELDA could not be denied. In this regard, D2 was definitely a public authority under the purview of s 2(a) of the PAPA. The obligations contained under the DA was thoroughly inseparable and were not merely secondary or ancillary to FELDA's main statutory duty to develop Federal lands for the socioeconomic betterment of its settlers. The DA might be a private contract, but the obligations contained under the DA was exactly what FELDA was statutorily bound to appropriately perform. Apart and separate from the applicability of the protection under PAPA, the accrual and lapsing of the limitation period still remained a crucial question of fact. Thus, it was also part and parcel of the list of triable issues which ought to be canvassed in a full trial (see paras 65, 70 & 72–74).

(4) Public policy required the court to meticulously scrutinise the DA and determine its legality (as it was squarely against public policy (especially in the context of FELDA) for this court to enforce an illegal contract). Applying the well-established principles governing the court's discretionary power in granting summary judgment to the facts at hand, there were indeed a serious conflict of material facts which could only be resolved by a careful and complete course of witness examinations vide a full trial. The defendants had succeeded in satisfying the court that there were serious and triable issues in this case (see paras 80 & 84).

[Bahasa Malaysia summary

Melalui satu perjanjian pembangunan ('PP') yang dimeterai pada 2 Jun 2014, defendan pertama iaitu Felda Investment Corp Sdn Bhd ('D1') telah melantik plaintif sebagai pemaju utama untuk membangun dan menyiapkan pembangunan bercampur pada 24 bidang tanah di kawasan yang dimiliki oleh defendan kedua iaitu Lembaga Kemajuan Tanah Persekutuan yang biasanya dikenali sebagai FELDA ('D2') ('tanah'). D2 adalah pemilik berdaftar dan

benefisiari tanah tersebut. Perkara 6.04(a) PP menetapkan bahawa untuk membolehkan plaintif melakukan pembangunan projek, D1 akan mendapatkan D2 untuk menyerahkan milikan tanah kosong kepada plaintif dalam waktu 30 hari dari tarikh PP dimeteraikan. Plaintif memplid bahawa selain daripada memberikan milikan kosong hanya satu daripada 24 petak tanah pada atau sekitar Januari 2016, defendan masih belum menyerahkan baki milikan kosong 23 petak kepada plaintif. Setelah lima tahun berlalu setelah PP dimeteraikan, plaintif mendakwa bahawa terdapat pelanggaran defendan kerana gagal memberikan hak milikan kosong 23 petak tanah selebihnya sebagaimana yang ditetapkan di bawah PP. Berdasarkan perkara 9.04 DA, plaintif memfailkan tindakan ini terhadap defendan yang menuntut perlaksanaan spesifik PP. Melalui lampiran 7, plaintif memohon penghakiman terus terhadap defendan menurut A 81 Kaedah-Kaedah Mahkamah 2012 untuk, antara lain, dekri perlaksanaan spesifik terhadap defendan yang memerlukan mereka mematuhi PP dan perintah seterusnya yang mengarahkan defendan untuk menyerahkan milikan kosong tanah kepada plaintif. Dalam pembelaan mereka, defendan terutamanya mencabar kebolehlaksanaan dan kesahan PP atas, antara lain, dengan alasan berikut: (a) DA terbatal dan tidak sah ab initio, tidak dapat dilaksanakan dan/atau boleh diketepikan kerana dicemari dengan penipuan, ketidakjujuran dan konspirasi Lembaga dan pihak pengurusan D1 yang terdahulu dan plaintif; (b) PP dilaksanakan dengan melanggar s 3 Akta Kemajuan Tanah 1956 ('AKT') kerana persetujuan Menteri tidak diminta atau diperoleh sebelum melaksanakan DA; (c) tuntutan plaintif dihalang oleh had masa menurut s 2 Akta Perlindungan Pihak Berkuasa Awam 1948 ('APPBA'); dan (d) plaintif tidak datang ke mahkamah dengan tangan yang bersih dan terdapat kelewatan yang tidak semestinya daripada plaintif dalam memohon untuk remedi perlaksanaan spesifik.

Diputuskan, menolak permohonan plaintif:

(1) Plaintif bagaimanapun dilantik sebagai pemaju utama projek walaupun hakikat bahawa plaintif sangat kurang memenuhi syarat dan kelayakan. Keadaan pelantikan plaintif menimbulkan kekhuatiran mahkamah untuk mempersoalkan logik dan alasan di sebalik pelantikan plaintif (yang tentunya menimbulkan isu yang boleh dibicarakan). Tidak masuk akal komersial atau perniagaan untuk FELDA melakukan pelaburan untuk pulangan pelaburan jauh lebih rendah daripada nilai tanah itu sendiri. Selain itu, FELDA mempunyai anak syarikat dalamannya sendiri yang sudah berada dalam industri pembangunan harta tanah dan perniagaan pembinaan. Memang ada keadaan yang sepertinya memberikan kepercayaan kepada tuduhan tidak jujur, penipuan dan konspirasi defendan. Terdapat fakta dan keadaan yang mempersoalkan integriti keseluruhan transaksi yang membawa kepada PP. Jelaslah mahkamah tidak boleh mengabaikan isu yang boleh dibicarakan ini.

Ketiadaan peruntukan penting dan kritikal dalam PP nampaknya menunjukkan bahawa terdapat unsur-unsur penipuan, kelebihan dan keuntungan yang tidak wajar yang diserahkan kepada plaintif oleh Lembaga dan pengurusan defendan sebelumnya. Ini sangat membingungkan bahawa pelaksanaan PP (dan pelantikan plaintif) ada sebelum persetujuan Lembaga Pengarah untuk pelantikan plaintif. Pelaksanaan PP kelihatannya boleh dipersoalkan dan nampaknya disediakan dengan tergesa-gesa. Saksi-saksi harus dipanggil untuk memberi keterangan tidak hanya atas kredibiliti pihak-pihak yang menandatangani DA, tetapi juga integriti PP tersebut yang tidak memiliki peruntukan jaminan. Di samping itu, tarikh pelaksanaan PP ditutup dengan jelas dan dikebelangkan pada 2 Jun 2014. Dengan fakta yang dipertikaikan secara serius ini yang dikemukakan kepada mahkamah beserta bukti-bukti dokumentari yang menyokong fakta-fakta tersebut oleh defendan bahawa PP dan surat kuasa wakil dicemari dengan penipuan dan konspirasi tidak boleh diabaikan oleh mahkamah dan kebenaran transaksi hanya dapat diselesaikan melalui bukti viva voce pada bicara penuh (lihat perenggan 27, 30–32, 34–36, 40 & 47).

(2) Kepentingan persetujuan Menteri sangat jelas dengan membaca s 3(3)(c) AKT. Ia bukan hanya syarat undang-undang tetapi ia menjadi asas kontrak undang-undang yang melibatkan defendan. Kegagalan mendapatkan kelulusan Menteri adalah isu serius dan boleh dibicarakan yang secara langsung mempengaruhi kesahan dan integriti PP. Asas PP adalah pembangunan tanah Persekutuan. *Res ipsa loquitor* bahawa semestinya diketahui oleh semua pihak bahawa mereka mesti mematuhi dan mematuhi undang-undang yang mengatur pembangunan tanah Persekutuan dengan FELDA. Plaintif tidak dapat berpura-pura tidak tahu terhadap undang-undang yang mengawal PP. Plaintif dengan kehendaknya sendiri memilih untuk terlibat dalam kesulitan ini dan tidak dapat dengan mudah menolak kehendak pematuhan undang-undang (persetujuan Menteri) terhadap defendan. Oleh kerana kegagalan untuk mendapatkan persetujuan Menteri sebelum melanjutkan dengan PP mempengaruhi asas DA, ia pasti akan mempengaruhi kesahan PP tersebut. Oleh itu, adalah tidak wajar bagi mahkamah untuk secara ringkas memerintahkan perlaksanaan spesifik apabila integriti dan kesahihan PP (dan dokumen sokongan lain) menjadi isu yang boleh dibicarakan di hadapan mahkamah (lihat perenggan 52–53, 56 & 59).

(3) D2 sebagai pihak dalam DA, jelas termasuk dalam definisi 'pihak berkuasa awam' kerana fungsi awamnya yang penting yang memikul kepentingan besar masyarakat mengenai pembangunan tanah (dalam usaha membasmi kemiskinan melalui penanaman kelapa sawit dan getah). Oleh itu, elemen asas awam yang wujud dalam FELDA tidak

dapat dinafikan. Dalam hal ini, D2 jelas merupakan pihak berkuasa awam di bawah s 2(a) APPBA. Kewajiban yang terkandung di bawah PP sama sekali tidak dapat dipisahkan dan tidak hanya sekunder atau tambahan kepada tugas undang-undang utama FELDA untuk membangun tanah Persekutuan untuk kemajuan sosioekonomi peneroka. PP mungkin merupakan kontrak persendirian, tetapi kewajipan yang terkandung di bawah PP adalah seperti yang diwajibkan oleh FELDA untuk dilaksanakan dengan sewajarnya. Terasing dan terpisah daripada penerapan perlindungan di bawah APPBA, permulaan dan peluputan tempoh had masa masih menjadi persoalan fakta yang penting. Oleh itu, ia juga merupakan sebahagian penting dari senarai isu yang boleh dibicarakan yang seharusnya diteliti dalam bicara penuh (lihat perenggan 65, 70 & 72–74).

(4) Dasar awam mengharuskan mahkamah untuk meneliti PP secara cermat dan menentukan kesahihannya (kerana bertentangan dengan dasar awam (terutama dalam konteks FELDA) agar mahkamah ini menguatkuasakan kontrak yang tidak sah). Dengan menggunapakai prinsip-prinsip yang mantap yang mengawal kuasa budi bicara mahkamah dalam memberikan penghakiman terus terhadap fakta-fakta yang ada, sememangnya terdapat konflik fakta material yang serius yang hanya dapat diselesaikan dengan pemeriksaan saksi yang teliti dan lengkap melalui perbicaraan penuh. Defendan telah berjaya memuaskan hati mahkamah bahawa terdapat masalah isu serius dan yang boleh dibicarakan dalam kes ini (lihat perenggan 80 & 84).]

Cases referred to

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382, SC (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)

Bank Simpanan Nasional v Rudysham bin Abdul Raof [2016] MLJU 909; [2017] 4 CLJ 234, HC (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (refd)

Chua Kim Suan (administratrix of the estate of Teoh Tek Lee, decd) & Anor v Government of Malaysia & Anor [1994] 1 MLJ 394, SC (refd)

Customer Loyalty Solutions Sdn Bhd (in liquidation) v Advance Information Marketing Bhd (previously known as Advance Information Marketing Sdn Bhd) & Ors [2017] MLJU 2174; [2017] 1 LNS 2146, HC (refd)

Datuk Ong Kee Hui v Sinyium Anak Mutit [1983] 1 MLJ 36, FC (folld)

Eng Song Aluminium Industries Sdn Bhd v Keat Siong Property Sdn Bhd [2018] 5 MLJ 380; [2018] 9 CLJ 311, CA (refd)

Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302, SC (refd)

Government of Malaysia v Lee Hock Ning [1973] 2 MLJ 51, PC (distd)

Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1, FC (refd)
Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd [2009] 6 MLJ 1, CA (refd)
MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd [2016] 2 MLJ 428, CA (refd)
Merdeka University Berhad v Government of Malaysia [1982] 2 MLJ 243, FC (refd)
Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619, FC (refd)
New Zealand Shipping Company, Limited v Société des Ateliers et Chantiers de France [1919] AC 1, HL (refd)
See Kui Seng Realty Sdn Bhd v Sam Yep Foo & Anor [2014] 1 MLJ 410, CA (refd)
United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor [1999] 1 MLJ 657, FC (refd)
Voo Min En & Ors v Leong Chung Fatt [1982] 2 MLJ 241; [1982] 1 LNS 47, FC (refd)
Woolley Development Sdn Bhd v Mikien Sdn Bhd [2008] 1 MLJ 585, CA (refd)
Yew Bon Tew & Anor v Kenderaan Bas Mara [1983] 1 MLJ 1, PC (refd)

Legislation referred to

Federal Constitution art 160(2)
Contracts Act 1950 s 24
Land Development Act 1956 ss 3, 3(2), (3)(c), 65
Public Authorities Protection Act 1948 s 2, 2(a)
Rules of Court 2012 O 14, O 81, O 81 r 3

Amrit Pal Singh (Austen Pereira and Ng Jun Wei with him) (Amrit & Company) for the plaintiff.
Kumar Kanagasingam (Michele Yee with him) (Lee Hishammuddin Allen & Gledhill) for the defendant.

Azimah Omar J:

INTRODUCTION

[1] Vide its encl 7, the plaintiff sought for a summary judgment against the defendants pursuant to O 81 of the Rules of Court 2012 ('the ROC 2012'), for, inter alia, the following orders:

(a) a decree of specific performance against the defendant requiring them to comply with article 6.04 of the development agreement (DA) dated 2 June 2014 in respect of the 23 parcels of land in the writ action mentioned in the terms of the minutes of the judgment hereunto annexed;

(b) a consequential order directing the defendants to forthwith deliver vacant possession of the aforesaid lands to the plaintiff within 14 days from the date of the order herein; and

(c) an order that the plaintiff be at liberty to apply to this court for such orders and directions as are necessary to have carriage of the decree of specific performance prayed above.

BACKGROUND OF THE CASE

[2] The relevant brief background facts which has led the plaintiff to file the present action are as follows.

Parties:

(a) the plaintiff (Synergy Promenade Sdn Bhd) is a company incorporated in Malaysia with its registered address at M5C/15, 2nd Floor, Jalan Pandan Indah 4/1, Pandan Indah, 55100, Kuala Lumpur and with its business address at C-00-11, Floor G, Plaza Damas 3, Block C, No 60 Jalan Sri Hartamas 1, 50480 Kuala Lumpur;

(b) the first defendant (Felda Investment Corp Sdn Bhd) is a company incorporated in Malaysia with its address for service at Level 8, Symphony House, Pusat Dagangan Dana 1, Jalan PJU1A/46, 47301 Petaling Jaya, Selangor;

(c) the second defendant (Federal Land Development Authority), commonly known as FELDA is a Malaysian Government agency formed under the Companies Act 2016 (previously Companies Act 1965) having its headquarters at Menara FELDA, Platinum Park, 11 Persiaran KLCC, 50088 Kuala Lumpur;

(d) the first defendant (first defendant) is and was at all material times a wholly owned subsidiary and investment arm of the second defendant (second defendant). It is the plaintiff's pleaded case that D1 is the alter ego of D2, considering that the first defendant (D1) is a wholly owned subsidiary and investment arm of the second defendant (D2).

The development agreement (DA):

(e) by a development agreement (DA) entered on 2 June 2014, the first defendant (D1) had appointed the plaintiff as the master developer to develop and to complete a mixed development on 24 parcels of land in an area of 20.66 acres owned by the second defendant (the said land). The said land is situated along Jalan Semarak, Kuala Lumpur;

(f) at all material times, D2 is the registered proprietor and beneficial owner of the said land;

(g) the recitals of the DA read as follows:

WHEREAS:-

1. FEDERAL LAND DEVELOPMENT AUTHORITY, is an agency of the Government of Malaysia formed under the Land Development Act 1956 having its headquarters at Menara FELDA, Platinum Park, 121 Persiaran KLCC, 50088 Kuala Lumpur ['FELDA'] and is the registered and beneficial owner of all that pieces and parcels of lands as listed in Appendix I ['Project Land'] measuring in total approximately 20.66 acres.

2. FIC is the investment arm of FELDA and fully responsible for all investment decision of FELDA.

3. FIC with the consent, instruction, knowledge and/or authority granted by FELDA has agreed to appoint SPSB as the MASTER DEVELOPER and the MASTER DEVELOPER has obtained at its own cost and expenses, the relevant approvals therefore from the Appropriate Authorities to build, develop and complete the development of the Project Land. A copy of the Letter of Award issued by FIC to the MASTER DEVELOPER dated 24th January 2014 is attached hereto as Appendix II.

4. The Project Land is not charged to any licensed bank, financial institution or any other similar body or authority.

5. The Project Land is delineated RED in plan attached hereto as Appendix III.

6. FIC and the MASTER DEVELOPER have agreed to enter into this agreement whereby FIC has agreed to appoint THE MASTER DEVELOPER at the sole cost of THE MASTER DEVELOPER to exclusively undertake development of the Project Land for mixed development together with all the necessary infrastructure and public utilities in accordance with the necessary approvals wherein FIC shall cause FELDA to provide the Project Land [such development and construction is hereinafter referred to as 'the Said Project'] in accordance with the terms and conditions of this Agreement.

(h) article 6.04(a) of the said DA stipulated that to enable the plaintiff (master developer) to carry out the development of the said project, the FIC (D1) shall cause FELDA (D2) to deliver vacant possession of the said Land to the plaintiff and/or its nominee(s) within 30 from the date of the said DA is executed;

(i) article 6.04(b) of the DA stated that the FIC will irrevocably confirm and ensure that FELDA shall not revoke vacant possession of the said land prior to the completion of the project;

(j) the plaintiff pleaded that aside from delivering vacant possession of only one of out of 24 parcels of the land (namely: Lot 390) on or about January 2016, the defendants have yet to deliver vacant possession of the remaining 23 parcels to the plaintiff;

(k) after a lapse of more than five years after the said DA was executed (more than three years after the vacant possession of Lot 390 was given), the plaintiff (relying on articles 6.04(a) and 6.04(b) of the DA) now claims that there was a breach on the part of the Defendants for failing to deliver vacant possession of the remaining 23 parcels of land as stipulated under the said PP. Pursuant to article 9.04 of the said DA, the plaintiff filed this present action on 19 July 2019 against the defendants seeking for specific performance of the development agreement; and

(l) alternatively, the plaintiff sought for damages in lieu of specific performance.

THE DEFENDANTS' DEFENCE

[3] The defendants vehemently resisted the plaintiff's claim and in their defence, the defendants primarily challenged the enforceabilty and validity of the DA on the folowing grounds:

(a) the said DA is null and void ab initio, unenforceable and/or is liable to be set aside as it is tainted with fraud, dishonesty and conspiracy of first defendant's previous Board and previous management and the plaintiff;

(b) the DA was executed in contravention of s 3 of the Land Development Act 1956 ('the LDA') as the consent of the Minister was not sought or obtained before executing the DA;

(c) the plaintiff's claim is time barred by virtue of s 2 of the Public Authorities Protection Act 1948;

(d) the defendants will commence a legal action to avoid, nullify and/or set aside the DA, power of attorney, lease agreement, sale and purchase agreements and deed of assignments; and

(e) the plaintiff did not come to court with clean hands and there has been undue delay on the part of the plaintiff in seeking for remedy of specific performance.

THE PLAINTIFF'S APPLICATION FOR SUMMARY JUDGMENT UNDER O 81 OF THE ROC 2012 (ENCL 7)

[4] The plaintiff's application is supported by the following affidavits:

(a) affidavit in support affirmed by Abd Rahman bin Soltan on 26 July 2019 ('plaintiff's affidavit in support') (encl 8); and

(b) plaintiff's affidavit in reply affirmed by Abd Rahman bin Soltan on 19 September 2019 ('plaintiff's affidavit in reply') (encl 18).

[5] The plaintiff contends that the plaintiff's suit is a plain and

straightforward claim for specific performance of the terms of the DA (namely article 6.04) as vacant possession of the said land has yet to be delivered to the plaintiff (and the 30 days stipulated under article 6.04 period had since lapsed). The plaintiff had also averred that there are no meritorius defence raised by the defendants and therefore the plaintiff is entitled to the orders that it has sought for.

THE DEFENDANTS' OPPOSITION

[6] The defendants contended that the present case is not an apropriate case to be disposed via a summary judgment as the defendants have demonstrated that there are serious dispute of facts which can only be properly determined in a full trial. The defendants further contend that these disputed facts are relevant to determine the propriety of the development agreement, and therefore oral evidence of witnesses is necessary.

THE PRINCIPLE OF LAW PERTAINING TO ORDER 81 OF THE ROC 2012

[7] At the outset, before this court proceeds to determine the merits of the plaintiff's application, it is germane for this court to first lay out the laws regarding a summary judgment application, particularly under O 81 of the ROC 2012.

[8] In determining whether the court ought to grant the order for summary judgment against the defendant for specific performance, the legal provision under O 81 of the Rules of Court 2012 ('the ROC 2012') particularly r 3 stipulates as follows:

> 2 Judgment for plaintiff (O 81 r 3)
>
> Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action, the Court may give judgment for the plaintiff in the action.

[9] The Federal Court in the case of *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 has held that the discretionary power vested unto court to grant summary judgment under O 81 is similar to what is conferred under O 14. The power conferred must be exercised judicially and with great care.

[10] There is a plethora of cases that have examined the legal requirements regarding a summary judgment application. Suffice for this court to only refer to some of the cases for clear understanding of the applicable laws and principles.

[11] The Court of Appeal in the case of *Woolley Development Sdn Bhd v Mikien Sdn Bhd* [2008] 1 MLJ 585 has made it clear on the duty of a judge in hearing and determining an application for summary judgment in the following manner:

> [42] When an issue of fact is raised in an affidavit opposing an application for a summary judgment *the trial judge thus is duty bound not to merely accept it superficially and in a cursory manner. He is not bound to accept any allegation uncritically. In exercising his judicial discretion the judge is obliged to critically examine any assertion of fact and to do so in a fine-toothcomb manner if need be to determine if it were a bona fide factual dispute worthy of determination at a full trial.* (Emphasis added.)

(See also *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (SC), *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517, *MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428).

[12] This court must also refer to the case of *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657 where the Federal Court has held that an application for summary judgment should be dismissed if it can be proved that *there are circumstances which constitute 'some other reason to be a trial'.*

(See also *Voo Min En & Ors v Leong Chung Fatt* [1982] 2 MLJ 241; [1982] 1 LNS 47. The Federal Court at p 243 held among others that '... That being the case, it is not enough for the respondent in answer to the appellant's application to sign final judgment, to raise an issue, or any issue. *He must, however, raise such issue as would require a trial in order to determine. In other words, the issue raised must be an arguable issue ...*'.)

THE DEFENDANTS' COUNSEL SUBMISSION

[13] The defendants contended that the DA executed by the plaintiff and the first defendant dated 2 June 2014 is null and void ab initio, unenforceable and/or is liable to be set aside as it is tainted with fraud, dishonesty and conspiracy of the first defendant's previous Board, the first defendant's previous management, the second defendant's previous Board and the plaintiff (conspirators).

[14] According to the defendants, the plaintiff and their related company, Synergy Promenade KLVC Sdn Bhd (SPKLVC) and their directors (ie Abdul Rahman Bin Soltan) ('Abdul Rahman') and Noraini bt Soltan ('Noraini') and solicitors (ie Messrs Yeap, Yong and Amy ('Messrs YYA) conspired with the first defendant's previous board, first defendant's previous management and the second defendant previous board, the then director of the land management of

FELDA (Shahrizal bin Mohd Saleh), the Head of Legal of FELDA (ie Helwani bt Lukman) or any two or more of them ('conspirators'), with intent to defraud and injure FIC and FELDA, conspired and combined together to defraud FIC and FELDA, conspired and combined together to defraud FIC and FELDA by unlawful means or for unlawful ends, by dishonestly or fraudulently causing the first defendant to appoint the plaintiff as the master developer of the proposed KLVC development and to execute the DA.

[15] The defendants further contended that the conspiracy set out above is part and parcel of a larger conspiracy or illegal or wrongful acts ('larger conspiracy') by the conspirators which is successfully carried out and if not set aside, would deprive FELDA of their interest and rights in the FELDA Semarak Lands and which would cause damage or injury to FIC and/or FELDA.

[16] The defendants had set out the allegations of dishonesty, fraudulent conducts and the conspiracy between the plaintiff, the first defendant previous Board and previous management in executing the said DA as follows:

(i) the DA was tainted with fraud as it was backdated to 2.6.2014.

(ii) the DA was executed without the consent of the Minister as required under section 3 of LDA 156.

(iii) the plaintiff was appointed as the master developer of the project despite its unsuitability as it has no track records or financial capability to carry out development of such magnitude.

(iv) despite the fact that the defendants' previous board and previous management knew and was fully aware that the Semarak land commercial value is valued from RM543 to RM1,062 million, they had entered into the DA with the plaintiff for an investment return of only a sum equivalent to 10% of the Gross Development Value of the project or RM500 million. The expected investment return is very much lower than the value of land. In fact, FELDA will incur losses rather than gaining any benefit.

(v) The DA's provisions did not secure FELDA's rights as a landowner in a joint-venture.

(vi) There was no timeline and milestone(s) of the works to be performed by the plaintiff under the said project.

(vii) the DA is against the sheer objective of FELDA of eradicating poverty in rural areas through the cultivation of palm oil and rubber.

(viii) the Power of Attorney executed by Tan Sri Isa Samad and D-G Faizoull was executed prior to the DA and it contains powers beyond the purpose of the DA.

(ix) the conspirators had executed a Lease Agreement dated 24.2.2015 with the plaintiff to lease out 700,000 sq ft space of the proposed office tower to be constructed on the FELDA Semarak lands.

(x) The conspirators were aware or ought to be aware that the plaintiff, (not being the landowner) has no right to lease out the Proposed Tower to D1.

(xi) having already owned Menara FELDA at Platinum Park, there is no reason for FELDA to acquire 700,000 sqft of office space.

(xii) acting as the attorney of FELDA (vide the POA) Abd Rahman and Noraini (being the directors of the plaintiff) had fraudulently sold 17 parcels and transferred a total 16 parcels of FELDA Semarak lands to the plaintiff and SPKLVC without any payment to FELDA.

THE PLAINTIFF'S REPLY ON THE ALLEGATIONS OF DISHONESTY, FRAUDULENT AND CONSPIRACY

[17] In reply to the allegations of dishonesty, fraudulent acts and conspiracy mounted against the plaintiff, the plaintiff's counsel contended as follows:

(a) the allegations of the plaintiff's fraud and dishonesty (which allegedly caused the second defendant's board of directors to approve the plaintiff's appointment as master developer) is unfounded and irrational;

(b) the plaintiff was never involved in the decision-making process of the second defendant's board of directors;

(c) the appointment of the plaintiff as the master developer of the Semarak Project was approved only after a preliminary assessment was submitted to the defendants;

(d) the DA was executed with express and/or implied knowledge and/or consent of D2's Board of Directors who expressly approved and ratified the same;

(e) the exchange of correspondences between the plaintiff and the defendants are consistent with all parties' intention;

(f) all legal requirements regarding the DA have been complied with by the plaintiff; and

(g) the plaintiff relies on the representation by the defendants to give full effect of the DA and thus, the defendants ought not be allowed to now renege against the DA.

THE ANALYSIS

Allegations of dishonesty, fraudulent acts and conspiracy of the plaintiff, first defendant's previous Board, first defendant's previous management and second defendant's previous board (conspirators)

[18] In opposing the plaintiff's application for a summary judgment to enforce the DA, the defendants have vigorously attacked the validity of the DA. It is the defendants' case that the DA was tainted with dishonesty and fraud by the conspirators. The defendants further contend that the DA was part and parcel of the conspiracy to injure and to cause losses to the defendants.

[19] This court observes that in support of the allegations of dishonest conduct, fraud and conspiracy against the conspirators in the execution of the DA, the defendants have mainly relied on the factual events and documentary evidence relating to the execution of the DA.

[20] The allegations of dishonesty, fraud and conspiracy had been pleaded and particularised by the defendants in paras 12–27 of their amended defence.

[21] This court must emphasise that as far as the plaintiff is concerned, the plaintiff's stand is clear. The plaintiff stood firmly on the stance that the DA is a valid and binding agreement as it was voluntarily executed by the parties. The plaintiff pleads that it has no involvement at all in the second defendant's board of directors' decision-making process. Hence, the first defendant's allegation of fraud and conspiracy against the plaintiff is baseless and unsubstantiated.

[22] But the burning question is this: can this court exercise its discretionary power vested unto it to summarily grant a specific performance order to enforce the DA when the validity of the DA is put under heavy scrutiny on serious grounds of contravention of a statute and allegations of dishonesty, fraud and conspiracy?

[23] To determine this question, this court must consider the facts of the case and the evidence that has been presented by the defendants via their affidavits filed herein.

[24] It remains undisputed that the development project (in which the plaintiff was appointed as the master developer) involved 24 parcels of land owned by FELDA (D1), all of which are located in a prime area of Kuala Lumpur. A development project involving 24 parcels of land is undoubtedly a project of immense scale. It is sufficiently immense that it can be considered a mega project. To embark into such mega project, the defendants' previous Board and management must be aware of and ought to have kept dearly in

mind of the primary objective of FELDA is to eradicate poverty (of FELDA settlers) in the rural areas through cultivation of palm oil and rubber. Therefore, the primary consideration in embarking into such a huge and mega project must be to optimise benefits and gains from the project. In order to achieve this objective, they must exercise utmost vigilance and diligence in appointing or selecting a collaborating partner. What must have been in their mind is that the collaborating partner must have sizeable and strong financial capability and stability as well as a good track record in the development and construction industry. To examine the propriety of the plaintiff's appointment, this court is beckoned to examine the same.

The plaintiff's annual report for the financial year ended 31 December 2012 to 31 December 2016

[25] How does the plaintiff fare in terms of its financial capability and track record? According to the annual report for the financial year ended 31 December 2012 to 31 December 2016 lodged by the plaintiff with the CCM, the plaintiff (at that material time) neither recorded any revenue nor any business (refer to exhs D7, D8, D9, D10 dan D11 of encl 10).

[26] With this fact considered, the defendants had alleged that from the very beginning, the FIC's previous board and management as well as FELDA's previous board were fully aware that the plaintiff is a company which is not suitable to be the master developer of the proposed KLVC development. They knew and were fully aware that the plaintiff neither has tangible or solid track record nor financial capability to carry out development of such magnitude.

[27] The plaintiff was nevertheless appointed as the master developer of the project despite the fact that the plaintiff is grossly lacking in suitability and qualification to undertake such mega project. The plaintiff on the other hand, went along with the defendants' previous board and management and proceeded to act in concert with them to cause its appointment as the master developer (although fully aware of its seeming incapability to undertake such mammoth project). Thus, though this court has yet to make a final determination, the circumstance of the plaintiff's appointment does raise this court's apprehension to question the logic and reason behind the plaintiff's appointment (which definitely raises a triable issue).

No meaningful evaluation carried out before appointment of the plaintiff as master developer

[28] The defendants had alleged that there was no meaningful evaluation undertaken by the first defendant's previous board and FIC's previous management when appointing the plaintiff as the master developer.

[29] Exhibits D12 and D13 of encl 10 are the valuation reports on the 24 parcels of land (Semarak lands) at the material time prepared by two valuers namely: (i) Messrs Firdaus Associates Property Professionals Sdn Bhd (FAPP); and (ii) the government's valuer, Jabatan Penilaian dan Perkhidmatan Harta (JPPH). FAPP had valued the commercial value of Semarak lands at RM1,062m; whilst JPPH on the other hand had determined the commercial value of the same Semarak lands to be RM543m.

[30] In the present case, FELDA had entered into an agreement with the plaintiff which entitled them a return on investment (ROI) of a sum equivalent to 10% of the gross development value of the proposed project or RM500m (while surrendering all of the Semarak Lands). Thereto, it does not make commercial or business sense for FELDA (as proprietor of parcels of land with commercial value ranging from RM543m to RM1,062m) to undertake an investment for a ROI much lower than the land value itself. It is sufficiently telling that FELDA had entered into an agreement which is disadvantageous to them. FELDA seemingly stood to gain way less than it stood lose.

[31] Furthermore, FELDA has its own internal (*in house*) subsidiary company which is already in the industry of property development and construction business. That considered, this court also beckoned to question the reason why would FELDA engage an *external* third party company to carry out the project (whereas alternatively, it is easier and more profitable for FELDA to engage its own subsidiary to undertake the project).

[32] On the facts highlighted above, this court opines that there are indeed circumstances which seem to lend some credence to the defendants' allegations of dishonesty, fraud and conspiracy. The contrast and the dispute are too stark that this court cannot simply determine by way of affidavit evidence. On one hand we have the DA with clear terms which allegedly was entered into unequivocally, but on the other hand there are facts and circumstances that questions the very integrity of the entire transaction leading up to the DA. Clearly this court cannot simply ignore this triable issue.

The joint-venture did not provide normal rights to FELDA as land owner

[33] The defendants contended that the joint venture did not secure the usual/normal rights of a landowner. The defendants question the following 'missing' features in the DA;

(a) the plaintiff as the master developer was not required to provide a bank guarantee to FELDA in order to secure the performance of the development under the proposed KLVC development;

(b) the normal requirement to appoint an independent architect to supervise the development of such a huge project is omitted/absent; and

(c) the DA did not stipulate any timeline and milestones of the works to be performed by the plaintiff under the proposed joint-venture project.

[34] This court observes that absence of such important and critical provisions in the DA seemingly suggests that there are elements of fraudulent biasness, undue advantage and profits handed out to the plaintiff by the defendants' previous Board and management. Nonetheless, this court cannot properly determine this issue until and unless viva voce evidence is admitted to shed much needed light (by all parties) regarding absence of these salient provisions. The necessity for witness examination is indubitable.

[35] Another peculiarity that this court is minded of is the sequence of events leading up to the plaintiff's appointment as the master developer for the project. The DA appointing the plaintiff as master developer was dated *2 June 2014* whereas the recommendation to appoint the plaintiff as the master developer was only submitted by the FIC's CEO to the previous Board on *16 Januray 2014*. Furthermore, the previous Board had only approved the appointment of the plaintiff on *2 September 2014* which was three (3) months after the DA was executed. This is clearly reflected in exh 'D15', encl 10. It is infinitely perplexing that the DA's execution (and the plaintiff's appointment) pre-existed the Board's approval of the plaintiff's appointment. It is common corporate practice that a Board's resolution or decision must come first before the company can proceed as it has proposed to the Board. This is yet another oddity in the extensive list of peculiarities which are triable issues that should be put before the court in a full trial.

[36] Considering this sequence of facts, this court agrees with the defendants that the execution of the DA is seemingly questionable and seems to be hastily prepared. As submitted by the defendants, this court opines that witnesses should be called to testify not only on the credibility of the parties signing the DA, but also the integrity of the said DA which lacks securing provisions.

The power of attorney (POA)/the lease agreement/the selling and transfer of 17 parcels of Semarak Land by the plaintiff to plaintiff/ SPKLVC

[37] The defendants also alleged that the execution of the DA was backdated to 2 June 2014 (and in reality the DA was executed later to the stipulated date in the DA). In support of this allegation, the defendants relied upon the power of attorney (POA) executed by Tan Sri Isa Samad (FELDA's previous chairman) and Faizoull (the previous Director General of FELDA). The POA was executed on 3 June 2014, one day after the execution of the DA (on 2 June 2014). According to the defendants, the execution of the DA was not in

accordance with normal legal and business practice as it was annexed together with the POA which was dated later than the DA itself. It is perplexing that a development agreement would annex a power of attorney that was executed later than the development agreement itself. Although the mere difference of one day seems benign, but in the context of a mega project, it is seriously peculiar that the execution of the contract's annexure is a date after the contract itself. Logically and sensibly speaking, if an agreement contains within it executed annexure(s), then the execution of that agreement can only occur after the execution of the annexure.

[38] This is not the case there the DA refers to a POA that is to be executed *in futuro*. Instead, the DA outright lists 'The Power of Attorney dated 3rd June 2014' in the DA's list of appendices. Thus, logically and clearly, the DA's execution can only occur after 3 April 2014 (which is exactly not the case here).

[39] Furthermore, the defendants also contended that the DA could not have been executed on 2 June 2014 as email correspondences between the plaintiff's solicitors and the FIC (see exh 'D6' of encl 10) indicated that even as late as 14 July 2014, the terms of the DA had not yet been finalised as parties were still discussing the terms.

[40] Upon perusal of exh 'D6', this court noted that the parties were still actively discussing and negotiating the terms of the DA well after the date of execution of the DA. The DA was executed on *2 June 2014*, whereas the email negotiating the terms of the DA was still on going as at *14 July 2014*. In fact, there was an email from Selwani Mohd Saleh (FICSB) to Amy (Yeap, Yong & Amy — solicitors for the plaintiff) dated *7 June 2014* which confirmed that the DA will be dated as 4 April 2014 which is clear act of backdating the DA. Considering the foregoing, this court agrees with the defendants that the DA's date of execution is clearly masked and backdated to be 2 June 2014.

[41] It would be unbecoming of this court if it is not alert to or not be weary of such discrepancy, and the underlying rationale or 'necessity' to cloak or mask the actual execution date of the DA. Hypothetically, if indeed the DA built upon a foundation of genuine transactions, then there should not be any need to misstate the execution date on the DA. There should not be any necessity to build or concoct a 'narrative' or 'timeline' other than the actual turn of events starting from negotiations right to the signing of the DA. But there seemingly exists an attempt to build a narrative in the present case, and this attempt is exactly what should be put before the court's scrutiny vide a full trial.

[42] The defendants further contended that the POA in and of itself contained powers beyond the purpose of the DA. With the excessive power vested on the plaintiff as FELDA's attorney, the directors of the plaintiff (Abd

Rahman and Noraini) had in 2015, sold 17 parcels and transferred a total 16 parcels of FELDA Semarak lands to themselves (the plaintiff) and SPKLVC without any payment to FELDA (via sale and purchase agreements dated 2 December 2015 (exhs D17, D18, D19 and D20, encl 10)).

[43] According to the defendants, the fraudulent conduct and conspiracy of the conspirators does not stop at the selling of Semarak lands. The fraud and conspiracy allegedly continues in that, on 29 September 2016, pursuant to the same POA, FIC's previous board and/or management had entered into a lease agreement with the plaintiff to lease the 700,000 sqft of the proposed office tower (proposed office tower) to be constructed on the FELDA Semarak Lands. The defendants contended that the leasing of the 700,000 sqft proposed office tower will eventually cause further losses and damage to the defendants up to RM1.5 billion (as this is the estimated total rental which the defendants would be required to pay to the plaintiff under the lease agreement).

[44] The defendants further contended that the plaintiff was aware or ought to be aware that the plaintiff has no rights whatsoever to lease out the said lands as the plaintiff was not even the land owner. The previous board and management were aware or ought to have been aware that the defendants did not require at all the said 700,000 sqft lands as FELDA already has Menara FELDA in Platinum Park.

[45] The entire transaction with the plaintiff and KLVC seemingly charts the defendants to a course of losses and damages. As indicated vide the defendants' exhibits, vide the DA and the POA, FELDA stood to lose the Semarak Lands (and indeed initially already lost 16 lots of it) in hopes for a measly RM500m return (which is already a loss of RM34m from the lowest valuation price, and losses up to more than RM500m from the highest valuation price). Now, further exacerbating the loss, FELDA (via FIC) now agreed to lease the proposed office tower on the Semarak Lands for a rental total of RM1.5 billion. It seems to be against the very fabric of business and commercial sense that FELDA would willingly surrender its Semarak Lands, and then rent or lease the same lands it surrendered. FELDA have already suffered losses in the surrender or relinquishment of the Semarak Lands, and FELDA doubled up on the losses to now pay rent to the same lands it surrendered.

[46] This is not the case where FELDA surrendered the Semarak Lands for valuable consideration. FELDA was not paid at all for the transfer of the 16 lots of the Semarak Lands. And apart from relinquishing the Semarak Lands for 'free', FELDA sought to lose even more by renting or leasing the lands it relinquished for free. The rhyme and reason why the previous Board and management of FELDA and FIC would ever endeavor into this losing transaction is a total mystery and clearly the facts regarding the DA is not at all

as simplistic and straightforward as the plaintiff is letting on. If there indeed shall be or shall not be any tangible reason or commercial value for undertaking the DA and the POA, then clearly this would be a triable issue that the parties must demystify at full trial.

[47] In light of these seriously disputed set of facts presented to this court together with documentary evidence supporting those facts by the defendants' that the DA and the POA are tainted with fraud and conspiracy must not be ignored by this court and the truth of the transactions can only be unraveled via viva voce evidence at full trial.

APPROVAL OF THE MINISTER

[48] It is also the defendants' case that under the LDA, it is incumbent for the defendants to obtain the approval of the Minister before executing any agreement. In this case, the DA was executed without the approval of the Minister. The defendants thus alleged that the DA is null and void and is also ultra vires the statutory provision of the LDA.

[49] The plaintiff had on the contrary submitted that the approval of the Minister is the responsibility of the second defendant and it is the internal matter of the second defendant. In addition, the plaintiff submits that the approval of the Minister is not an impediment to an order for specific performance. In supporting this, the plaintiff referred to the case of *Eng Song Aluminium Industries Sdn Bhd v Keat Siong Property Sdn Bhd* [2018] 5 MLJ 380; [2018] 9 CLJ 311.

[50] In this regard, a reference to s 3(3)(c) of the LDA is inevitable. Section 3(3)(c) stipulates the following:

> 3 Establishment, duties and powers of Authority
>
> (3) The Authority shall have power, for the purpose of the discharge of its duties under subsection (2) —
>
> (c) with the approval of the Minister to enter into a partnership, joint venture, undertaking, co-operation in any manner, an arrangement for the sharing of profits or to carry on such activities in association or otherwise, with any person, public authority, corporation, company or other body (including the Government of the Federation or any State Government) carrying on or engaging in any such activities and to take or otherwise acquire shares and securities of any such public authority, corporation, company or other body, and to sell, hold on, reissue with or without guarantee, such shares and securities or otherwise dispose of or deal with them;

[51] It is pertinent for this section to be read together with sub-s (2) of which provides the following:

(2) The Authority shall have the following duties:

(a) *to undertake and carry out land development projects*;

(b) to promote and assist in the investigation, formulation and implementation of projects for development, settlement and management of land in the Federation;

(c) to promote, stimulate, facilitate and undertake economic, social, residential, agricultural, industrial and commercial development and management and other ancillary activities and services in any area for which the Authority has been vested with the power to carry out land development projects or any other area which has been acquired, purchased, leased by or alienated to or is otherwise held or enjoyed by the Authority or its corporations or companies for the performance of its functions;

(d) to undertake and carry out such activities as may assist in the modernisation of the agricultural sector in the area mentioned under paragraph (c); and in particular activities relating to the production, utilisation, processing and marketing of crops, livestock and fresh water fisheries;

(e) to assist, guide, advise, manage, administer and coordinate economic, social, residential, agricultural, industrial and commercial activities whether within or outside the area mentioned under paragraph (c).

[52] This court must emphasise that the significance of the Minister's approval is very much glaring by reading s 3(3)(c) of the LDA. This court opines that it is not just a statutory requirement but it forms the very foundation of a legal contract involving the defendants. From the reading of the said section, the public authority will only be empowered to enter into an agreement with the approval of the Minister. Thus in absence of such approval the public authority has no right at all to enter into any agreement.

[53] It is an uncontroverted fact that the approval of the Minister was not obtained before parties proceeded with the DA. In this regard, *this court is of the view that the failure of obtaining the approval of the Minister is a serious and triable issue which directly affects the validity and integrity of the DA.*

[54] Since the issue of legality of the contract raised by the defendants, it is apt for this Court to indulge on the law regarding illegal contracts albeit in the present case, the allegation of illegality is not *ex facie* (on the face of it). In *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619, the Federal Court had discussed at length on the issue of illegal contracts and has stated, inter alia:

[33] In *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281, the former Supreme Court per Peh Swee Chin, delivering the judgment of the court,

said:

> Courts have always set their face against illegality in any contract. *It is very well settled that the courts take judicial notice of such illegality and refuse to enforce the contract, and such judicial notice may be taken at any stage, either at the court of first instance or at the appellate stage irrespective of whether illegality is pleaded or not where the contract is ex facie illegal.*
>
> When the contract *is not ex facie illegal, then on the question of pleadings, there is only one situation where illegality need not be pleaded when the court can still take judicial notice of illegality and refuse to enforce it.* The situation is when facts which have not been pleaded emerge in evidence in the course of the trial showing clearly the illegality, eg the illegal purpose of the contract, or its illegal consideration, with the presence of all relevant circumstances, see eg *Palaniappa Chettiar v Arunasalam Chettiar* 1, *Leong Poh Chin v Chin Thin Sin* 2, and *North Western Salt Co Ltd v Electrolytic Alkali Ltd* 3 just to mention a few. The existence of such a situation in the instant appeal is warranted by the facts that emerged in evidence, including affidavit evidence.

[34] And in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520, the Court of Appeal per Gopal Sri Ram JCA, as he then was (VC George JCA, Abu Mansor JCA, as he then was, concurring) held that 'the justice of a case will ordinarily lie in favour of permitting a plea of illegality to be taken for the first time on appeal because it is unjust that a party who has broken the law should succeed' (see also *Mustafa bin Osman v Lee Chua & anor* [1996] 2 MLJ 141, where Gopal Sri Ram JCA, as he then was, delivering the judgment of the court, affirmed 'that illegality need not be specifically pleaded').

[35] *Clearly, therefore, courts are bound at all stages to take notice of illegality, whether ex facie or which later appears, even though not pleaded, and to refuse to enforce the contract. In that regard, we endorse the following statement of law by the Court of Appeal per Hamid Sultan JCA, delivering the judgment of the court, in China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal* [2014] 5 MLJ 1:

> At the outset we must say that the trial courts must be vigilant not to provide any relief on contracts which is void on the grounds of public policy, or illegality ... whether or not it is the pleaded case of the parties or whether the issue was raised during the trial. The case of *Blay v Pollard & Morris* [1930] 1 KB 628 where Scrutton LJ observed:
>
> Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment.
>
> which has been followed in a number of local cases will not stand to tie the hands of judges to deal with the above issues, or arrest impropriety on its own motion at limine ...

[55] Therefore, since the issue of the failure to obtain the Minister's approval will affect the enforceability and/or legality of the DA, this court should be cautious and slow (on the ground of public policy), from summarily granting an order for specific performance.

[56] It is a facile statement to say that it is solely the responsibility of the second defendant to obtain the Minister's approval. It is equally erroneous for the plaintiff to contend that statutory compliance with the LDA is merely an 'internal matter' within FELDA. It is well encoded in our law, in s 24 of the Contracts Act 1950 that a contract or its consideration cannot be against a statute. Thus, it is in the interest and obligation of all contracting parties to ensure that a contract is in compliance with the statutory laws. The basis of the DA is development of Federal Land. *Res ipsa loquitur* (it speaks for itself) that all parties ought to have known that they must comply with and abide by the governing law of developing Federal Lands with the the Federal Land Development Authority (being FELDA). The plaintiff cannot feign ignorance to the very statute governing the DA. If the plaintiff insists on undertaking the DA (although the plaintiff ought to have known of the impediment) then, the maxim of *volenti non fit injuria* applies. The plaintiff out of its own volition elected to be embroiled in this predicament and cannot simply deflect the want of statutory compliance (Minister's approval) against the defendants.

[57] The legal status of FELDA (D2) as a government agency (which is a beacon of safeguarding public interest and transparency) intensifies the necessity for this court to be extra critical in scrutinising the issue on the enforceability of the DA.

[58] This court finds valuable guidance in the Federal Court decision in the case *Datuk Ong Kee Hui v Sinyium Anak Mutit* [1983] 1 MLJ 36 where the Federal Court had described the application of the maxim of *ex turpi causa non oritur actio*:

> (2) The second issue — Legal effect of the arrangement:
>
> *As the arrangement between the respondent and his party in the matter of his remuneration and resignation is illegal and the illegality is not only with regard to its performance but in its very inception, such arrangement is therefore void ab initio and the parties are outside the pale of the law. The respondent being a party thereto cannot claim any remedy under this arrangement.* He is not entitled to the refund of the balance of his remuneration kept by the party, nor could he claim any damages, special or general, in connection with his forced resignation: ex turpi causa non oritur actio. *Even if he had no knowledge of the illegality, the arrangement being intrinsically and inevitably illegal, the law gives him no allowance for innocence so far as consequences are concerned. Waugh v Morris* [1983] 1 MLJ 36; [1873] LR 8 QB 202 *JM Allan Merchandising Ltd v Cloke & Anor* [1963] 2 QB 340 On the other hand the appellant is entitled to rely upon illegality in his defence in order to meet the respondent's claim. The reason why the law allows the appellant to do so, as explained by Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp 341 at p 343; 98 ER 1120, 1121 is due to the general principle of public policy contained in the maxim *ex dolo malo non orituractio.* The court will not assist a person to pursue his claim if it arises *ex turpis* and when the defendant is equally at fault the court will apply the maxim *potior est conditio defendentis.* The learned trial judge therefore

should have dismissed the respondent's suit in toto.

[59] Applying the abovementioned authority, this court is of the view that since the failure to obtain approval of the Minister before proceeding with the DA affects the inception of the DA, it will undoubtedly affect the legality of the said DA. Particularly when this court is pressed against the actual virtuous mission of FELDA (in the interest of the rural poor and its settlers), the safeguard of public policy weighs heavily on this court's shoulders. It is far too presumptuous, precarious even, for this court simply disregard the larger and wider narrative and underlying facts surrounding the DA. Therefore, it is unfitting for this court to simply summarily order the specific performance when the very integrity and legality of the DA (and other supporting documents alike) becomes a triable issue before this court.

Limitation issue

[60] Next, this court will consider whether the plaintiff's action against the defendants is statute-barred under s 2(a) of the Public Authorities Protection Act 1948 ('the PAPA') which reads:

> 2. Protection of persons acting in execution of statutory or other public duty
>
> Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect —
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

[61] The law is settled regarding the issue of limitation. The Privy Council in *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1 at p 6 held that the limitation under PAPA is 'just as much a 'right' as any other statutory or contractual protection against a future suit' (see *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1).

[62] However, before this court proceeds to deal with the issue of limitation raised by the defendants (whether the plaintiff's action against the defendants is statute-barred under s 2(a) of the Public Authorities Protection Act 1948), it is pertinent for this court to first determine whether the defendants, particularly the second defendant is indeed a public authority under the purview of PAPA.

[63] In determining the meaning of 'public authority', this court refers to Federal Constitution, art 160(2) which interprets 'public authority' as follows:

> 'Public authority'
>
> means the Yang di-Pertuan Agong, the Ruler or Yang di-Pertua Negeri of a State, the Federal Government, the Government of a State, a local authority, a statutory authority exercising powers vested in it by federal or State law, any court or tribunal other than the Federal Court, the Court of Appeal and High Courts, or any officer or authority appointed by or acting on behalf of any of those persons, courts, tribunals or authorities;

[64] In *Merdeka University Berhad v Government of Malaysia* [1982] 2 MLJ 243 the Federal Court had deliberated on the interpretation of 'public authority' under s 2(a) of the PAPA. In that case, the Federal Court ruled, inter alia, that a university is a statutory authority exercising powers vested in it by federal law and is therefore a public authority. The Federal Court had further held that:

> With respect, we agree with the learned judge that MU (Merdeka University) would be a public authority for the reasons given by him. The operative word in the definition in art 160(2) must necessarily be the word 'authority', and *for a person or body to constitute such an entity there must be some public element and utility in its constitution, operation, functions, powers and duties.* Viscount Simon LC said at p 178 in *Griffiths v Smith* [1941] AC 170 with regard to the managers of a non-provided public elementary school that the body of managers are a statutory body created by the relevant statutes for the discharge of public duties and therefore a public authority and are not analogous to companies acting for profit as in *Attorney-General v Company of Proprietors of Margate Pier and Harbour* [1900] 1 Ch 749. As the learned judge pointed out, the plaintiff's petition and memorandum of association make it clear that the plaintiff is a non-profit making corporation and this would equally apply to MU which it is sponsoring.

[65] The D2 (FELDA) as the party to the DA, is clearly included under the definition of 'public authority' due to its crucial public function which shoulders the great interest of the public in respect of land development (in efforts of eradicating poverty through the cultivation of oil palm and rubber). FELDA's primary function is to carry out land development projects, industrial and agricultural activities to enhance the socio-economic and quality of life of the rural poor to ultimately bridge the gap between urban and small urban areas as clearly described in their own website. Therefore, the fundamental public element that exists within FELDA cannot be denied. In this regard, it is plain for this court to see that D2 is definitely a public authority under the purview of s 2(a) of the PAPA. Therefore, PAPA applies.

[66] PAPA's applicability over FELDA is further cemented considering that s 65 of the LDA in and of itself, explicitly cites and cross-refers to protection of

FELDA under PAPA:

> 65 Public authorities protection
>
> The Public Authorities Protection Act 1948 [Act 198], shall apply to any action, suit, prosecution or proceeding against the Authority or any board or corporation or against any member, officer, servant or agent of the Authority or any board or corporation in respect of any act, neglect or default done or committed by him in such capacity.

[67] Now, this court was referred to the decision of the Privy Council in *Government of Malaysia v Lee Hock Ning* [1973] 2 MLJ 51 which held that:

> the right of the respondent in that case was correlated not with a statutory right or duty which was the provision of education but with the obligations entered into by the appellants in their contract with the respondent and accordingly the respondent's claim was not barred by the Public Authorities Protection Ordinance.

[68] In short, to this court's reading, the Privy Council drew a distinction between actions against a public authority against conducts or omissions directly related to that public authority's statutory duty (in that case, to government's duty to provide education), and actions based on obligations undertaken by the authority, ancillary to (and not directly related to) its statutory duty (in that case, to pay for work done under building contracts for schools).

[69] To this court's understanding, apart from ascertaining whether FELDA is a public authority, it is also pertinent to ascertain whether the nature of the parties' complaints and relationship here warrants the protection under PAPA. FELDA as a public authority not necessarily for all time and circumstances would be entitled to the protection under PAPA. And the question for this court to unravel is whether or not the defendants' obligations under the DA is ancillary to (or separable to) that of FELDA's statutory duty to develop lands for the betterment of the poor and rural settlers.

[70] And this court ultimately finds that the obligations contained under the DA is thoroughly inseparable and are not merely secondary or ancillary to FELDA's main statutory duty to develop Federal Lands for the socioeconomic betterment of its settlers. It is not this court's intention to detract from the Privy Council's decision above. In fact, this court understands the Privy Council's distinction as the government's mains statutory duty is *to educate* (provide education) and certainly its obligations under the building contracts *to pay for construction work done* is separable and secondary to the government's statutory duty to provide education.

[71] In the present case, the exact mission and purpose of the DA itself takes major cue from the name of the statute itself (ie development agreement as compared to Land Development Act). The *primary purpose of the DA* itself was to 'develop lands' which does not fall far from *FELDA's primary/statutory* duty to appropriately and transparently develop lands for the betterment of its settlers.

[72] The DA might be a private contract, but the obligations contained under the DA is exactly what FELDA is statutorily bound to appropriately perform. Thus, this court finds that the case of *Lee Hock Ning* above ought to be distinguished from the present case.

[73] Nonetheless, it is still not safe for this court to simply determine the issue of time bar at this interlocutory juncture. Apart and separate from the applicability of the protection under PAPA, the accrual and lapsing of the limitation period still remains a crucial question of fact. Furthermore, considering the immensity of the allegations and other issues of fraud, conspiracy, and dishonesty rife in the present case, it is equally incumbent for this court (in furtherance of public policy and interest) to really endeavour to get to the bottom of this dispute and unearth the real unperturbed truth of the matter.

[74] Thus, the accrual and lapsing of the limitation period is also part and parcel of the list of triable issues which this court certainly finds ought to be canvassed before this court in a full trial.

OTHER ISSUES

A party cannot benefit from his own wrong or default

[75] The plaintiff also submits that the defendant cannot now exploit their own default or wrongdoing to justify their reluctance to proceed with the DA and had referred to the cases of *Customer Loyalty Solutions Sdn Bhd (in liquidation) v Advance Information Marketing Bhd (previously known as Advance Information Marketing Sdn Bhd) & Ors* [2017] MLJU 2174; [2017] 1 LNS 2146 and *Bank Simpanan Nasional v Rudysham bin Abdul Raof* [2016] MLJU 909; [2017] 4 CLJ 234 to support their contention on the principle that *a party cannot benefit from his own wrong or default.* This court will now elaborate further on this issue.

[76] The principle that 'none can benefit out of its own fault' was elaborated at length by the House of Lords' in *New Zealand Shipping Company, Limited v Société des Ateliers et Chantiers de France* [1919] AC 1.

[77] Wan Hamzah SCJ in *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302 has also echoed the same sentiment via the following excerpt of the SCJ's decision:

> The rule is that if a stipulation in a contract be that the contract shall be void on the happening of an event which one or either of the parties can by his own act or omission bring about, *then the party who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong to put an end to the contract,* vide the judgment of Lord Atkinson in *New Zealand Shipping Company Ltd v SDAECD France* [1919] AC 1. In the present case the first defendant alleges that it had not obtained the consent of the plaintiff company to cease to operate at the address stated in cl 14(ii). Therefore the first defendant being the blameable party cannot be permitted to take advantage of his own wrong in ceasing to operate at that address without the consent of the plaintiff company, to put an end to the agency agreement.

(See also *See Kui Seng Realty Sdn Bhd v Sam Yep Foo & Anor* [2014] 1 MLJ 410.)

[78] This court takes cognisance that it is trite law that a party ought not be permitted to take advantage of his own wrong to put an end to the contract as deliberated in the abovementioned authorities. However, this court is of the view that this legal principle does not concretely lend any credence to the plaintiff's position. First and foremost, this court must reiterate that the failure to obtain the statutorily required Minister approval is not unilaterally attributable to the defendants. This statutory wrong is equally the fault of the plaintiff for feigning ignorance to the very statute that governs the DA. Secondly, considering that the entire transaction, obligation, and essence of the DA is already put to intense scrutiny, this court cannot yet simply make a determination which of these obligations (or any obligations for that matter) is enforceable against any parties (especially the defendants). Whether or not it is incumbent upon the defendants to perform the DA still stands as a triable issue that can only be determined via a full trial.

The principle of public policy

[79] This court takes judicial notice that FELDA (second defendant) was first established with the main and clear objective of developing lands for the interest of the public. Thus, the very foundation of the establishment of FELDA is intimately intertwined with the interest of the public at large. Therefore, this court cannot ignore the fact that every decision taken by FELDA must take into account the principle of public policy.

[80] On that note, it rests heavily on this court that public policy requires this court to meticulously scrutinise the DA and determine its legality (as it is squarely against public policy (especially in the context of FELDA) for this court to enforce an illegal contract).

[81] This court finds guidance in the Court of Appeal's decision in *Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd* [2009] 6 MLJ 1 wherein the Court of Appeal deliberated on the issue of the illegality of a disputed contract as follows:

> [18] In our view, the evidence has established that the plaintiff was in breach of the express covenants contained in cl 5.5 and cl 5.9. Being the party in breach of the law, due to its failure to obtain the building approval for the construction of the building structures and the procurement of the licences to carry out entertainment business in the building, the plaintiff is precluded from enlisting the assistance of the court. In other words, the plaintiff's illegal acts had precluded the plaintiff from pursuing its action: *ex turpi causa non oriter actio*. An action does not arise from a base cause: see Latin for Lawyers.
>
> [19] *This clear and well recognised legal maxim is founded in good sense. No court will enforce an illegal contract or allow itself to be made the instrument of enforcing obligations arising out of a contract or transaction which is illegal, and the illegality is duly brought to the notice of the court, and the person invoking the aid of the court is himself implicated in the illegality, even if the defendant has not pleaded the illegality*. So long as the evidence adduced by the plaintiff proves the illegality, the court will not assist him: per Lindley LJ in *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724 at p 728. See also Contracts Act 1950. (Emphasis added.)

[82] In *Chua Kim Suan (administratrix of the estate of Teoh Tek Lee, decd) & Anor v Government of Malaysia & Anor* [1994] 1 MLJ 394, the Supreme Court held that:

> *We have decided after most anxious consideration that any claim for loss of earnings from any illegal source should not be allowed on the ground that it is against public policy*. We think that we would also follow, on this point, the decisions of *Ooi Han Sun* 4; *Burns* 5; *Lebagge* 6 and *Dhlamini* 7 and approve the dictum in question in Yaakub 1. We therefore uphold the decision of the learned judge in the court below and that of the learned registrar at the first instance that the claim for that part of damages as related to earnings from the illegal operations of the taxi should be disallowed; because ex turpi causa non oritur actio or, in other words, such claim would be against public policy. We would like to emphasise the timely caution of the learned Chief Justice of Singapore in *Ooi* 4, that the maxim has a limited application in tort. The maxim's principal role lies mainly and almost exclusively in actions on contract.

Unclean hands and delay issues

[83] In light of the harrowing facts, circumstances, and allegations mounted in this case the determination of whether or not any party has reached out for

the aid of this court (bona fide or otherwise) also hinges on the same triable issues which must be determined via a full trial.

CONCLUSION

[84] Applying the well-established principles governing the court's discretionary power in granting summary judgment to the facts at hand, this court finds that there are indeed a serious conflict of material facts which can only be resolved by a careful and complete course of witness examinations vide a full trial. In other words, the defendants have succeeded in satisfying this Court that there are serious and triable issues in the present case.

[85] Hence, based on the aforementioned reasons, this court rules that the application by the plaintiff for summary judgment under O 81 of the Rules of Court 2012 is dismissed with cost of RM10,000 to be paid by the plaintiff to each defendant (subject to allocator)

Plaintiff's application dismissed.

Reported by Nabilah Syahida Abdullah Salleh